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No. 96-7171

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1996

—◆—
RANDY G. SPENCER,

Petitioner,

v.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,
Respondents.

—◆—
On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

—◆—
REPLY BRIEF FOR PETITIONER

—◆—
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ARGUMENT

- I. The collateral consequences of the State of Missouri's official finding that Spencer committed three felonies satisfy the applicable requirements of nonmootness under both Article III and 28 U.S.C. § 2254.**

For the first time, the respondents argue in their brief before this Court that Spencer has not met the constitutional "case or controversy" criterion for federal court jurisdiction. Respondents' Brief (RB) 9 & 14-19. A party's raising such an issue at the eleventh hour suggests that the objection may be less persuasive than that party now asserts it to be. *Cf. Gomez v. United States District Court*, 503 U.S. 653, 654 (1992).

- A. The same factors that establish jurisdiction under 28 U.S.C. § 2254 and this Court's decisions construing it suffice to establish a "case or controversy" under Article III.**

A habeas corpus action does not become moot when the petitioner is released after having filed his or her petition. *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968). In no post-*Carafas* decision has this Court suggested that in order to support jurisdiction under Article III, the petitioner must be incarcerated or under threat of execution throughout *every* stage of the proceedings before the district court, the court of appeals, and this Court. Collateral consequences continue to exist throughout the proceedings that keep alive the underlying claims.

In *Sibron v. New York*, 392 U.S. 40, 57 (1968), the Court held that one must *presume* criminal convictions to have collateral consequences supporting jurisdiction after the prisoner's release. To overcome the presumption, the respondent must show that "there is no possibility that any collateral consequences will be imposed on the basis of the challenged conviction." Unlike the amici from seventeen states, the respondents do not appear to challenge *Sibron*. Instead, the respondents now argue that there is a difference of *constitutional proportion* between the collateral consequences of a

parole revocation for forcible rape, armed criminal action, and possession of a controlled substance, on the one hand, and a criminal conviction for passing an insufficient funds check, on the other. On the respondents' account, the collateral consequences of an official finding that a petitioner passed a bad check satisfy Article III, whereas the collateral consequences of an official finding that a petitioner was guilty of forcible rape, armed criminal action, and crack cocaine possession do not. Such a captious distinction does not make a constitutional difference.

Respondents refer to a three-pronged test on the basis of which they deny that Spencer's claims present a "case or controversy" within the meaning of Article III. RB 14-16. They pull this test out of several purely civil cases. Respondents cite no habeas corpus case in which this Court applied the test they now proffer.

As this Court has frankly acknowledged, the distinction between the constitutional "case or controversy" requirement and the prudential considerations of justiciability is not a bright line. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). In *United States Parole Commission v. Geraghty*, 455 U.S. 388, 400 (1980), the Court characterized the Article III mootness doctrine as "flexible." Mootness is a more flexible concept than standing, because it is one thing to hold that a person should not be in federal court in the first place, and another thing to hold throw a person out of federal court – when he or she was properly there – because of intervening events for which he or she is not responsible.

In applying its criteria for Article III standing, this Court has been aware of the consequences of its decisions. Excluding this case from the category of "cases or controversies" in the constitutional sense would allow government officials to deny constitutional rights with impunity.

In none of the "case or controversy" decisions that the respondents now cite, moreover, did the Court deal with an action that the Framers marked out for special protection. U.S. Const. art. I, § 9, cl. 2. Before the Framers and the People of the United States created the federal judiciary and

constitutionally defined its jurisdiction, the privilege of the writ of habeas corpus existed. The Suspension Clause of Article I refers to a privilege that the People's grant of *any* power to the central government presupposed. This clause uses the passive voice, rather than limiting its prohibition to Congress or the states: *no one* shall suspend the privilege, "unless in Cases of Rebellion or Invasion the public Safety may require it." Although the Judiciary Act of 1789, 1 Stat. 82, did not extend federal habeas corpus jurisdiction to persons under state custody, there is no basis for suggesting that a habeas corpus action is not a "case or controversy" within the meaning of Article III.

Adopting the position of the court below would be a de facto suspension of the writ of habeas corpus as applied to probationers and parolees, because the reader of any such opinion would know exactly what to do to prevent this category of Americans from obtaining federal judicial relief from unlawful detention. In this special context, one must apply with care, if at all, the judicially crafted doctrine in the general civil cases on which the respondents rely. These general civil cases do not take into account the Suspension Clause and the values running back to Magna Carta that it reflects. They do not take into account the decisions of this Court setting the metes and bounds of this separate, preexisting remedy. They do not take into account all of the applicable reported decisions of the circuits other than the court below, which follow *Evitts v. Lucey*, 469 U.S. 397, 391 n.4 (1985), as to official findings of criminal wrongdoing other than convictions. As the facts of this case illustrate, there is a high abuse potential if respondents can avoid both habeas corpus scrutiny and civil liability in probation and parole revocation cases by delaying their responses, and if district courts can insulate their work from review by delaying their decisions. Whether or not the Suspension Clause guarantees that a given claim is cognizable in federal habeas corpus, any claim that *is* cognizable in federal habeas corpus is a "case or controversy" as the Framers defined "the judicial Power of the United States."

In any event, in this action the same factors that suffice for jurisdiction under section 2254 and this Court's precedents applying it should also suffice to establish a "case or controversy" under Article III.

As this Court expressed the "case or controversy" limitation on federal jurisdiction in *United Food & Commercial Workers Union Local 751 v. Brown Group*, 116 S.Ct. 1529, 1533 (1996), it requires "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision."

Here, the "injury in fact" is the official finding that Spencer is guilty of forcible rape, armed criminal action, and possession of a controlled substance (crack cocaine). The immediate consequence of this injury is that the State of Missouri returned Spencer to its Department of Corrections. The collateral consequences are the ones this Court identified in *Evitts* in respect to criminal convictions, as well as prejudice to his consideration for parole in the future, subjection to inherently prejudicial evidence under Fed. R. Evid. 413, and disentitlement from seeking damages under section 1983.

There is a causal connection between Spencer's injury and the conduct of the parole personnel, because *but for* the constitutional violations in the revocation process, the hearing panel would not have found Spencer guilty of these three instances of criminal misconduct, and he would not have the revocation on his record. These constitutional violations related directly to the reliability of the factfinding that resulted in the revocation. As Spencer has documented in his opening brief at 31, if Spencer had been guilty of the alleged offenses for which the State of Missouri revoked his parole, his sentencing exposure would have been two consecutive life sentences. If the State of Missouri had had a case against Spencer which would have withstood proper notice, representation, and an opportunity to cross-examine the witnesses against him – the principal rights it denied him in the parole revocation proceedings – it would have *prosecuted* him for these offenses. Instead, it imprisoned him for the remainder of a three-year term for burglary and stealing, and branded him

with the stigmata that the respondents now find it convenient to depreciate before this Court.¹

This injury is amenable to judicial relief. An order expunging the parole revocations would relieve Spencer from the testimonial impeachment, sentence enhancement, Rule 413 prejudice, and parole consideration consequences, and would allow him to bring an action for damages under 42 U.S.C. § 1983. Notwithstanding the respondents' arguments (*e.g.*, RB 26, 28 & 32), the ongoing effects of the injury arise from the order of revocation, not from the alleged underlying conduct. These allegations are *nothing* without the imprimatur of the State of Missouri.

In this special area of litigation, the harms to Spencer and the risk of abuse by respondents are grave enough that the purposes of the three-factor test this Court has identified in general civil litigation cases support Article III jurisdiction.

In further reply to the respondents' recent invocation of the "case or controversy" defense, Spencer observes that the realism this Court has expressed in developing the "capable of repetition, yet evading review" doctrine ought to play a part in its analysis here. Insofar as this doctrine once applied *only* to cases where the *same* plaintiff or petitioner would be burdened by the defendant's or respondent's conduct, *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), the *principle* of this limitation has not survived *Roe v. Wade*, 410 U.S. 113 (1973).

In *United States Parole Commission v. Geraghty*, 445 U.S. at 398, this Court observed that the "capable of repetition, yet evading review" doctrine "was developed outside the class-action context," and applies when "the litigant faces

¹ Respondents attempt to avoid the causal link between the constitutional violations and the resulting injury by asserting that if a person is subject to enhanced sentencing for a future offense, *he or she* is the "intervening cause." RB 21. If accepted, this premise would sweep away the relevant holding of *Evitts v. Lucey*, 469 U.S. 387 (1985), to say nothing of Eighth Amendment claims. One could equally avoid sentence enhancement or breaking on the wheel by not committing another crime.

some likelihood of becoming involved in the same controversy in the future," such that "vigorous advocacy can be expected to continue." It added that if there were "no chance that the named plaintiff's expired claim will reoccur," one must resort to class certification before the claim expires in order to avoid mootness. *Id.* at 398-99 (emphasis supplied). Accordingly, the Court held that Geraghty met the "personal stake" requirement for continuing to appeal the district court's denial of class certification in an action challenging parole guidelines, even though he had been released from prison while the appeal was pending. *Id.* at 398-407.

Other courts have applied the "capable of repetition, yet evading review" doctrine to cases analogous to Spencer's. In *People ex rel. Maxian v. Brown*, 164 A.D.2d 56, 561 N.Y.S.2d 418 (1990), *aff'd*, 77 N.Y.2d 422, 570 N.E.2d 223 (1991) (per curiam), trial-level courts held that the petitioners' pre-arraignment detention for more than twenty-four hours was presumptively unnecessary. By the time the parties argued the respondents' appeals, all of the petitioners had been either arraigned or released. The appellate court held that the appeal was not moot, because "the within proceedings raise important issues as to the limitations imposed by State law upon pre-arraignment detention." It concluded that "due to the temporary nature of the challenged detention," the claims were "capable of repetition, yet evading review" and therefore "not foreclosed by the mootness doctrine." *Id.* at 58, 561 N.Y.S.2d at 419, quoting, respectively, *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975), and *Williams v. Ward*, 845 F.2d 374, 380 n.6 (2d Cir. 1988).²

² Accord, *People ex rel. Brown v. New York State Board of Parole*, 139 A.D.2d 548, 550, 527 N.Y.S.2d 40, 41 (1988) (habeas corpus petition challenging timeliness of parole revocation hearing not moot on expiration of sentence because "issue raised is likely to recur, is substantial and novel, and will typically evade review") (internal citation omitted). See also *Yadom v. Kiley*, 204 Ill.App.2d 418, 424-25, 562 N.E.2d 310, 313 (1990) (petition for release from a mental institution was not moot even though the period of commitment it challenged had expired; "[o]therwise, dismissal for mootness of orders involving commitment periods of short duration

Whereas *Gerstein* and *Williams* were class actions, this vehicle is not available in habeas corpus. When, as here, the "temporary nature" of the immediate consequences of the respondents' or the lower courts' practices would otherwise preclude relief from the violation of the rights of persons such as Spencer, courts have found disputes to be "capable of repetition, yet evading review." There is always a category of persons whose probation or parole has been revoked, but who could not first exhaust state remedies and then litigate a federal habeas corpus action within the 359 days the respondents hold out as acceptable for processing such an action (BIO 4-5). The brevity of the six-month sentence at issue in *Sibron* was one of the factors this Court cited in its reasoning.³

When the practical consequences of a probation or parole revocation can far exceed those of a six-month jail sentence, there is no reason for confining this principle to convictions. Instead, the reasons for applying the "capable of repetition, yet evading review" standard include Spencer's case.⁴

might remove an entire class of cases from appellate review").

³ "Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process - in the context of prosecutions for 'minor' offenses which carry only short sentences. We do not believe the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. A State may not cut off federal review of whole classes of cases by the simple expedient of a blanket denial of bail pending appeal. As *St. Pierre [v. United States]*, 319 U.S. 41 (1943), clearly recognized, a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing." *Sibron v. New York*, 392 U.S. 40, 52-53 (1968) (footnotes omitted).

⁴ When this Court held that the standard did not apply in *Lane v. Williams*, 455 U.S. 624 (1982), it did not refer to the fact that *Lane* was not a class action. Instead, it observed, first, that "[t]he possibility that other persons may litigate a similar claim does not save this case from mootness," and, second, that because the prisoners had learned - since they

Being recommitted to prison after having had one's parole revoked is in fact a stronger case than pregnancy for being flexible about mootness. Since *Lane v. Williams*, 455 U.S. 624 (1982), Congress and the state legislatures have been increasing the proportion of convicted citizens' sentences that they must serve before even being considered for parole. By contrast, there was a natural limit on the transitory nature of Jane Roe's circumstances. Given the respondents' and the district court's handling of Spencer's case, and the respondents' unrehabilitated position that this delay was perfectly legal and proper (RB 34-41), one can hardly deny that there is "some likelihood" that they will continue to behave as they did in delaying Spencer's case. If re-release or discharge moots a revokee's constitutional claims, and there is no right to have a petition ruled on before re-release or discharge (absent dilatory misconduct on the part of the petitioner), then *not only* the underlying constitutional claims, *but also* the delay and mootness issues themselves, will escape appellate review.

For these reasons, the policies and principles underlying the "capable of repetition, yet evading review" exception counsel against accepting the respondents' new invocation of Article III doctrine.

pled guilty – about the mandatory parole term of which they did not have notice when they did so, they could not *in principle* be subject to the same constitutional violation. *Id.* at 633-34.

Neither of these factors is present in Spencer's case. If this Court does not reverse the court below, there is *no* "possibility that other persons may litigate a similar claim" if, as in Spencer's case, the respondents and the district court delay the disposition of the habeas corpus action until the probationer or parolee is re-released or discharged. In light of what happened to Spencer in 1992, and in light of the respondents' report that Spencer will be eligible for parole in 1999 (RB 8 n.1), one cannot say that he could not again be subjected to an unconstitutional parole revocation. Consequently, neither of the grounds the Court adduced for declining to find the prisoners' situation in *Lane* "capable of repetition, yet evading review" applies to Spencer's case.

B. Petitioner is not raising new or different issues for the first time in this Court.

Although the respondents insert defenses for which they cite Article III and several civil cases arising under it for the first time in their merits brief, the same respondents claim that *Spencer* cannot advance any reasons besides effects on future parole consideration as a basis for this Court's granting and reversing the judgment of the court below. RB 6, 8, 11 & n.5, 18, 21, 23-24.

Petitioner's references to testimonial impeachment, sentence enhancement, Fed. R. Evid. 413 prejudice, and preclusion of section 1983 relief are not new claims or issues, but additional argumentative support for the point Spencer raised on appeal from the district court's self-created holding of "mootness." In the cases the respondents cite in an attempt to avoid the merits, however, the parties seeking relief from this Court raised new *claims*.

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), this Court reversed the lower courts' holdings that the petitioner could not proceed with an action under 42 U.S.C. § 1983; in addition to advancing her grievances under that statute, the petitioner asked this Court to "revive" *different* statutory provisions and to allow her to proceed under them on remand, when it had held these provisions unconstitutional in the *Civil Rights Cases*, 109 U.S. 3 (1883). In response to this proposed expansion of the litigation that was before the court of appeals, this Court declined to consider the new issue. *Id.* at 147 n.2.

In *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 348 (1981), the district court did not award costs under Fed. R. Civ. P. 68, because the defendant corporation's putative offer of judgment was too small to be a good-faith effort to resolve the dispute. The court of appeals affirmed on the same ground. In addition to the Rule 68 point on which the court of appeals decided the case, the defendant corporation sought to raise a claim it had not raised in the court of appeals, *i.e.*, that the district court abused its discretion in not awarding costs

under a completely separate rule. This Court held that the latter claim was not properly before it. *Id.* at 363.

By providing additional reasons for resolving a claim in his favor, Spencer did not present a new claim. His *sources* for the testimonial impeachment and sentence enhancement reasons in support of his position on nonmootness were decisions *the court below cited* in its opinion holding his case moot. JA 135, *citing United States v. Parker*, 952 F.2d 31, 33 (2d Cir. 1991) (per curiam), and *Robbins v. Christianson*, 904 F.2d 492, 495-96 (9th Cir. 1990). If Spencer's counsel in this Court were *not* free to develop and emphasize the grounds of these decisions in the course of demonstrating how the decision of the court below conflicted with them, then a certiorari petition could be reduced to a transmittal letter for the petitioner's brief before the court below. Much of the argumentative development of the collateral consequences that *Parker* and *Robbins* identify took place in direct response to the *respondents'* attempt to distinguish Spencer's case from them. *Compare* Reply Brief in Support of Petition at 6-13 with BIO 6-8.

Spencer's citation and exposition of *Parker* and *Robbins* occurred in the course of establishing a conflict between the decision of the court below and the decisions of every other reported opinion by a United States court of appeals that has addressed the issue before this Court. Now that the Court has granted certiorari, and has the general question before it, Spencer's counsel have a duty to the Court and to their client to present *all* of the reasons for reversal that they believe to be meritorious.

For example, Fed. R. Evid. 413's freestanding threat of admitting the parole revocation for forcible rape in a federal criminal trial did not exist until after Congress adopted it in 1994. Legislative adoption of this rule changed the background against which this Court decided *Lane*.

In addition, *if* this Court adopted the position of the Eighth Circuit's lone reported opinion holding a parole revocation claim moot on similar facts – instead of the position of the several circuits that both Spencer and the seventeen amici cite – *then* under *Heck v. Humphrey*, 512 U.S. 477

(1994), Spencer would be absolutely precluded from any federal-court relief for the unconstitutional revocation of his parole. There is no argument that a claim for *damages* under section 1983 would be moot because Spencer is no longer confined pursuant to the parole revocation. But *Heck* requires him to bring *and prevail in* a habeas corpus action before he can proceed under section 1983. This consequence is part of what this Court has a right to consider in making its decision on the *issue* he raised below – whether or not the parties explored this *factor* below. It is not a separate claim, as were the claims in *Adickes* and *Delta Air Lines*.

Lest there be any doubt, Spencer does not abandon the reason set forth in his brief and argument before the court below, that the unconstitutional revocation of his parole in 1992 makes him less likely than he ought to be to receive parole again. Respondents' argument that this factor is not cognizable is absolutely unrealistic: whether or not the Board of Probation and Parole *must* take a prior revocation into account, the respondents *know* it *will*. Only their misreading of *Lane* saves this objection from utter frivolity.

C. Forfeiture of Spencer's cause of action under 42 U.S.C. § 1983 is a sufficient collateral consequence to defeat mootness.

Respondents dismiss in one paragraph the discrepancy between their position and this Court's decisions in *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), and *Edwards v. Balisok*, 117 S.Ct. 1584, 1587-89 (1997). RB 32. Elsewhere they claim that this Court should accept the absolute foreclosure of any federal relief for their violations of the United States Constitution. RB 35-36. Respondents are attempting to whipsaw Spencer in order to avoid being held to account for their treatment of him before a court of another sovereign: if their position were the law, they could not only deny prisoners a day in court on their petitions for release, but also avoid any exposure for damages.

Spencer cannot believe this Court intended such a result when it made section 1983 plaintiffs' remedies for certain

claims contingent on successful litigation of an action under section 2254. To the contrary, in the case on which this Court based the *Heck* decision, the Court expressed its expectation that the district courts would process habeas corpus petitions in a "swift, flexible, and summary" or "expeditious" manner. *Preiser v. Rodriguez*, 411 U.S. 475, 498, 491 (1973). Spencer has met the Court's expectations by going to the state courts first; the respondents and the district court have failed to meet its expectations, and have instead created the situation in which all participants in this case find themselves.

Spencer does not suggest a system of outcome-determinative deadlines for the disposition of cases involving probation and parole revocations. *Cf.* 28 U.S.C. §§ 2261-66 ("fast track" for capital cases in jurisdictions that meet minimum standards for post-conviction relief representation). Respondents and the district court hold out nothing but self-serving boilerplate to justify their delay in this case. RB 37. If a district court actually *cannot* resolve a probation or parole revocation case before the petitioner is re-released or discharged, and the petitioner is free from fault in respect to the delay, then the courts should not deny the petitioner all federal relief by holding his or her habeas corpus action moot.

D. Respondents err in attempting to create a dichotomy between "present" and "future" collateral consequences.

Respondents attempt to reconcile their position with this Court's decisions by characterizing the collateral consequences of criminal convictions as "present" and those of probation or parole revocations as "future effects." RB 19-24. Respondents' false dichotomy would undercut this Court's recognition, in *Evitts*, that the availability of a prior official finding of wrongdoing for the purposes of testimonial impeachment and sentence enhancement defeats mootness. If a disability does not defeat mootness because it is not "present," but is somehow contingent on being the victim of a tort or the defendant in a criminal case, then testimonial impeachment and sentence enhancement do not defeat mootness in

respect to a criminal conviction. Whether the official finding of wrongdoing is a criminal conviction or a parole revocation, in contemporary America it is like having one's ear cut off in medieval England.

Having one's right to damages foreclosed is also a "present" detriment, whether or not one has filed a section 1983 action. In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), this Court held that the defendant could waive his right to file an action under section 1983 in consideration for dismissal of criminal charges against him. His cause of action was a present right, which he could bargain away. Spencer's section 1983 claims are present causes of action, but ones that, under *Preiser*, he cannot pursue until he has litigated a habeas corpus action.⁵

E. Testimonial impeachment and sentence enhancement are collateral consequences of probation or parole revocation.

At various points in their attempt to avoid the consequences for their case of the consequences of a parole revocation for Randy Spencer, the respondents suggest that Spencer can always argue, at a future trial, that the accusations on the basis of which the Board revoked his parole were not true. RB 25, 26, 30 & 32. This Court anticipated their reasoning in *Sibron* when it said, of criminal convictions, "the sooner the issue is fully litigated the better for all concerned."⁶ This

⁵ Even the court below acknowledged that the pendency of a section 1983 claim suffices to keep a habeas corpus action attacking the same physical custody from becoming moot on the cessation of the physical custody. *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995). The court below cited this decision in its opinion holding Spencer's claims moot, but failed to acknowledge its applicability. RB 134.

⁶ 392 U.S. at 56-57. The Court continued: "It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover, litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die

Court's insight applies with *greater* force to parole revocations, in that a person who has been convicted of a *crime* has had the full benefit of the protections in the Bill of Rights, whereas a parole revocation can be based on a much lower showing than a criminal conviction.

1. **An adverse party can use a probation or parole revocation to impeach the credibility of a witness, so long as the adversary articulates an acceptable reason and does not otherwise prejudice the witness.**

In *State v. Greer*, 39 Ohio St.3d 236, 530 N.E.2d 382 (1988), *cert. denied*, 490 U.S. 1028 (1989) – a capital case – the defendant had testified and had denied any participation in the murder for which he was on trial. The prosecution cross-examined him, asking if he had not been on parole, but returned to prison for a parole violation. The Ohio Supreme Court approved of this impeachment, by presenting the violation as conduct bearing on his credibility:

As the term "parole" implies, the one released upon parole must, as a condition precedent to his release, *promise* to observe certain terms and conditions. As such a violation of parole constitutes a specific instance of failure to keep his word. Such a failure is almost always "probative of truthfulness or untruthfulness" and is therefore an appropriate subject for impeachment-oriented cross-examination.

39 Ohio St.3d at 243, 530 N.E.2d at 393-94 (emphasis in the original).

In *Kopacek v. State*, 567 P.2d 102 (Okla. Crim. App. 1977), a defendant testified on direct examination that he had been convicted of three prior felonies. On cross-examination, the prosecutor began adducing additional facts about the time

or memories fade. And it is far better than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action."

the defendant had served. The prosecutor asked about a release on parole, and in response to a subsequent question the defendant testified that he was returned to prison for a parole violation. Defense counsel objected, and the court overruled the objection. The Oklahoma Court of Criminal Appeals affirmed, reasoning that because the defendant had testified that he had been convicted of three felonies, the prosecutor could adduce testimony about the parole violation "to show the jury that they have not been given a complete account of his criminal record." *Id.* at 105.

State v. Comstock, 647 S.W.2d 163 (Mo. Ct. App. 1983), illustrates how Missouri law follows the general pattern of allowing impeachment with parole revocations at the drop of a hat. The prosecutor asked a question that he knew or should have known the defendant would answer by saying that his probation had been revoked; the defendant answered truthfully. The jury heard the answer. The Missouri appellate court held that defense counsel made the wrong objection, and made it too late. *Id.* at 165. In addition, the court held that the prosecutor *properly* cross-examined the defendant about his probation revocation by using it to counter his testimony that he would not have engaged in the prison sodomy for which he was on trial, because he would have been eligible for parole four days after the incident. *Id.* at 165-66. *Accord*, *State v. Gainey*, 280 N.C. 366, 374, 185 S.E.2d 874, 880 (1972) (defendant explained flight by saying he was on parole and not supposed to be out after midnight; prosecutor properly cross-examined him by asking if he had not been found to have committed other parole violations).

Respondents attempt to belittle the impact of such testimonial impeachment by citing *State v. Newman*, 568 S.W.2d 276, 278-82 (Mo. Ct. App. 1978). RB 29. *Spencer* had cited *Newman* in his reply brief in support of certiorari (at 8 n.2), correctly noting that *Comstock* distinguished it. In *Newman* a Missouri appellate court held that a prosecutor exceeded the proper scope of cross-examination by "amplify[ing] the prior convictions" to which the defendant had testified on direct examination. This lengthy cross-examination included the *details* of the defendant's parole revocation and criminal

convictions, as well as drug and alcohol abuse, plea-bargaining, and other prejudicial matter. *Id.* at 278-81. The State of Missouri argued that this combination of prejudicial matter was nonetheless admissible. *Id.* at 277. The court disagreed, reaffirming the rule that "[t]he prosecution is entitled to show only 'the nature and number' of prior convictions, and is not entitled to engage in cross-examination of the defendant with respect to details of the prior crimes." *Id.* at 281, citing *State v. Scott*, 459 S.W.2d 321 (Mo. 1970).

Although it mentioned "breach of parole" as one such detail, *Newman* is not authority for the proposition that a parole revocation is inadmissible to impeach a witness. If the prosecutor had attempted to justify the use of a parole violation on the ground that it undermined the defendant's truthfulness, as in *Greer*, or that it undercut his explanation of something he had done or not done, as in *Comstock*, his overall cross-examination may still have led to reversal, but the reversal would have been in spite of the questioning on the parole revocation.

2. Probation and parole revocations have sentence enhancement consequences apart from the accusations of primary conduct on which they rely.

A probation or parole revocation has significant consequences under the U.S. Sentencing Guidelines. The revocation *must* be used in determining whether a prior conviction is counted in criminal history, and *may* be used as a ground for departing upwardly from the guideline sentence range.

In determining criminal history, these guidelines count prior sentences that occurred within the past fifteen years or that imposed incarceration into the fifteen-year period. When a defendant's probation or parole is revoked, and he or she is incarcerated on revocation, that incarceration counts as a prior sentence. See U.S.S.G. § 4A1.2(e)(1). Thus, revocation is likely to cause a sentence that would otherwise fall outside the fifteen-year limit in section 4A1.1 to fall within the

fifteen-year period, and be counted as part of the defendant's criminal history in any future federal criminal case.

Section 4A1.3 allows an upward departure when "reliable information" shows that a defendant's criminal history as calculated under section 4A1.2 does not "adequately reflect the seriousness of [his or her] past criminal conduct or the likelihood that [he or she] will commit other crimes." In Spencer's case, it is *only* the parole revocation that could possibly count as "reliable information" to the effect that he was guilty of the criminal misconduct of which the State of Missouri accused him in moving for revocation. It is this official finding of criminal misconduct, not any underlying "fact," that would support an upward departure. For all of their effort to depreciate the seriousness of the order of revocation, the respondents do not suggest that an order of the Board of Probation and Parole is not "reliable."

Respondents disparage the effects of parole revocations under the Missouri Sentencing Guidelines by observing that they are "purely advisory." RB 26. They are more than mere "advice," however, in that these official, statewide pronouncements will foreseeably set the expectations of the parties in plea negotiations. Like the Board's official finding that Spencer committed forcible rape, armed criminal action, and possession of crack cocaine, the Missouri Sentencing Guidelines lend the imprimatur of the sovereign to what might otherwise be the opinion of a few citizens - let alone triple hearsay from a crackhead.

II. *Lane v. Williams* does not support the foreclosure of all federal remedies when the delay in disposition of the habeas corpus action resulted from the exhaustion of state remedies and the behavior of the respondents and the district court.

Respondents argue that *Lane v. Williams*, 455 U.S. 624 (1982), had a constitutional basis (and was constitutionally compelled) even though this Court indicated no such basis for its holding. RB 14, 19 & 40. Respondents' revised version of

Lane reads too much into it and too little from the rest of the Court's applicable decisions.

In *Lane*, two Illinois prisoners, Williams and Southall, sought to challenge their *underlying sentences* based on pleas of guilty. Their intervening release on parole, revocation, return to custody, re-parole, and complete discharge from custody had nothing to do with their attack on the voluntariness of their pleas. Each of these prisoners contended that his guilty plea was invalid because neither the sentencing judge nor anyone else had informed him of a mandatory parole term he would need to serve after his sentence of imprisonment. This Court recognized this distinguishing fact when it said: "[Williams and Southall] have never attacked, on either substantive or procedural grounds, the finding that they violated the terms of their parole." 455 U.S. at 633.

Unlike the prisoners in *Lane*, Randy Spencer does not question his underlying sentence or the legitimacy of the term of parole supervision to which the State of Missouri subjected him. Instead, he maintains that when the State of Missouri has revoked his parole in violation of the Constitution of the United States, and when he has exhausted his state-court remedies for the State's constitutional violations, he has a right to a judicial remedy in the courts of the United States.

In *Lane*, the district court's order granting relief did not require the prisoners' custodian "to expunge or make any change in any portion of [the prisoners'] records," nor had the prisoners "ever requested such relief." 455 U.S. at 634 n.14 (emphasis supplied). Here, Spencer's opening brief in the court below prayed, as his first choice for relief, that the court "absolve [his] record of the alleged parole violation." Brief of Appellant at 36. Spencer continued to seek this relief through oral argument before the court below.

This Court decided *Lane* before its decision in *Heck* clarified the sequence in which probationers and parolees must bring their challenges to revocations in order to seek damages under section 1983. It decided *Lane* before it recognized testimonial impeachment and sentence enhancement as collateral consequences of convictions in *Evitts*. It decided *Lane* before Congress made sex offense findings such as the

Board's order against Spencer independently admissible in federal sex-offense trials.

In *Lane* there was no record that the custodians or the district court had *caused* the prisoners' claims to become "moot" by delaying their response or the disposition in the prisoner's habeas corpus action. Here, the respondents do not deny that the same district court sets different deadlines for cases involving executions and extraditions, but maintain that "logic, fairness and habeas law" support the district court's failure to take account of the time-sensitivity of probation and parole revocation cases, even when, as here, the petitioner's impending release was undisputed and appeared on the face of the pleadings. RB 38-39. Unlike the case before this Court in *Lane*, this is one in which a ruling for the state would mean that its attorneys and the district court could deny the petitioner *any relief at all* for the state's violation of his federal rights simply by delaying the disposition of the case.

Thus, Spencer does not ask the Court to overrule any of its precedents. The court below and the respondents have misread *Lane* to bar petitions different from the one it involved. The judgment must be reversed.

CONCLUSION

WHEREFORE, the petitioner renews his prayer for the Court's order that the judgment of the court below be reversed, and for such other relief as law and equity indicate.

Respectfully submitted,

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